GOVERNMENT OF MALAYSIA v. NURHIMA KIRAM FORNAN & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
MAIRIN IDANG J
[ORIGINATING SUMMONS NO: BKl-24NCvC-190-12-2019(HC2)]
17 MARCH 2020

CIVIL PROCEDURE: *Jurisdiction – High Court – Natural and proper forum – Commencement of Spanish Arbitration pursuant to Deed of Cession concerning grant and cession in perpetuity of territories and lands within State of Sabah – Whether there was provision in Deed of Cession indicating parties' consent or intention to refer disputes to arbitration – Whether there was valid or binding arbitration agreement – Whether there was waiver of sovereignty immunity of Malaysia so as to confer jurisdiction in proceedings before Superior Court of Justice of Madrid – Whether there was nexus between Spain and Deed of Cession – Whether High Court of Sabah natural and proper forum to determine dispute – Courts of Judicature Act 1964, s. 23(1) – Rules of Court 2012, O. 11*

ARBITRATION: *International arbitration – Challenge against – Commencement of Spanish Arbitration pursuant to Deed of Cession concerning grant and cession in perpetuity of territories and lands within State of Sabah – Whether there was provision in Deed of Cession indicating parties' consent or intention to refer disputes to arbitration – Whether there was valid or binding arbitration agreement – Whether there was waiver of sovereignty immunity of Malaysia so as to confer jurisdiction in proceedings before Superior Court of Justice of Madrid – Whether there was nexus between Spain and Deed of Cession – Whether High Court of Sabah natural and proper forum to determine dispute – Courts of Judicature Act 1964, s. 23(1) – Rules of Court 2012, O. 11*

This was an action by way of originating summons ('encl. 1') filed by the Government of Malaysia in relation to the matter of an *ad hoc* arbitration in Spain between the plaintiff and the first to eighth defendants before one Dr Gonzalo Stampa as sole arbitrator. The first to eighth defendants had commenced the Spanish Arbitration pursuant to the Deed of Cession, signed between the Sultan of Sulu and Baron Gustavus de Overbeck and Alfred Dent of the North Borneo Company in 1878, which in present day was binding upon the heirs of the Sultan of Sulu, and the Sovereign State of Malaysia. The heirs of the Sultan of Sulu had, in 1939, submitted to the jurisdiction of this court, then under the title of the High Court of the State of North Borneo, in respect of a dispute under the Deed of Cession, where judgment was delivered by the then Chief Justice in the case of *Dayang Dayang Haji Piando Kiram of Jolo, Philippines & 8 Others v. The Government of North Borneo & Others* ('1939 Suit') in favour of the heirs. Despite the absence

of any, or any valid or binding agreement between the parties to the Deed of Cession to refer disputes thereunder to arbitration, and despite the submission by the heirs of the Sultan of Sulu to this court, the Superior Court of Justice in Madrid was moved by the first to eighth defendants to appoint a sole arbitrator in the Spanish Arbitration without regard, *inter alia*, to establish conflict of laws and forum selection rules, and in violation of the Sovereign Immunity of Malaysia. According to the plaintiff, the appointment of Dr Gonzalo Stampa, as the sole arbitrator in the Spanish Arbitration was null and void for procedural defects and substantive lack of jurisdiction in the proceedings in the Superior Court of Justice in Madrid, and consequent to this, Dr Gonzalo Stampa had no jurisdiction over the Sovereign State of Malaysia. The plaintiff submitted that the commencement and prosecution of the Spanish Arbitration by the first to eighth defendants were accordingly oppressive and vexatious, and carried on in violation of the legal and sovereign rights of Malaysia. Thus, the plaintiff submitted that in such circumstances, it was proper for this court, as the natural forum for any disputes arising from the Deed of Cession, to enjoin the defendants from proceeding with the Spanish Arbitration. The plaintiff sought the following reliefs, *inter alia* (i) a declaration that there was no valid or binding or any arbitration agreement contained in the grant by the Sultan of Sulu of Territories and Lands on the mainland of the Island of Borneo dated 22 January 1878 ('Deed of Cession'); (ii) a declaration that there was no arbitration agreement between the plaintiff and the first to eighth defendants; (iii) a declaration that there was no waiver of the Sovereign Immunity of Malaysia, whether through the plaintiff or otherwise, such as to confer jurisdiction in proceedings before the Superior Court of Justice in Madrid for the purported appointment of Dr Gonzalo Stampa, as sole arbitrator in *ad hoc* arbitration proceedings commenced by the first to eighth defendants in Spain; and (iv) a declaration that this court was the natural and proper forum to determine a claim by the first to eighth defendants against the plaintiff.

Held (allowing encl. 1):

(1) There was no provision in the Deed of Cession that could be construed either expressly or impliedly indicating the parties' consent or intention to refer disputes arising from such Deed of Cession to arbitration. The Deed of Cession was silent as to the specific dispute to be referred to arbitration, the seat of arbitration and appointment of arbitrators, which were requirements needed to indicate parties' submission to arbitration. Thus, there was no valid legal basis for the defendants to be referring dispute arising from the Deed of Cession to the Spanish Arbitration. The absence of any valid and enforceable arbitration agreement between the parties estopped the first to eighth defendants from referring to any

alleged dispute to arbitration. The act of the defendants in persisting with the Spanish Arbitration despite no binding arbitration agreement established between the parties amounted to a grave violation of the plaintiff's legal rights and the court must not stand idle to allow such abuse of process to persist. (paras 18, 21, 30 & 31)

(2) It had been clearly and expressly provided for in the Deed of Cession that any dispute that arose between the parties to the Deed shall be submitted to Her Britannic Majesty's Consul-General for Borneo, a designation that no longer existed. The absence of such designation today was acknowledged by the first to eighth defendants in their notice of arbitration dated 30 July 2019 submitted to the Spanish Arbitration. It was due to such absence that prompted them to request for the appointment of an appropriate person or persons by the British Government to fulfil the Consul-General's role in determining the alleged dispute laid before the Spanish Arbitration. Nevertheless, the UK Foreign & Commonwealth Office on behalf of the British Government in a letter dated 8 December 2017, declined such request on various grounds, *inter alia*, the unclear identity of the first to eighth defendants beyond the description provided by them in their letter to the office, and the unclear position of the Deed of Cession and the rights or claims of the first to eighth defendants may have under such Deed of Cession after the dissolution of the Colony of North Borneo in 1963. The Office had suggested that the first to eighth defendants should take up their claim directly to the Government of Malaysia, which to date, they had refused to do so. (paras 22, 26 & 27)

(3) The Deed of Cession was not a trading or commercial agreement, but one relating to cession of land by a Sovereign to predecessors of what was now a Sovereign State. In such circumstances, Malaysia is absolutely immune from the proceeding in Spain. The plaintiff, as a Sovereign State, could not be forced to submit to the jurisdiction of Dr Gonzalo Stampa. The dispute in the instant case, which was over territorial rights in Sabah, was not arbitrable. The sole arbitrator could not assume jurisdiction over Malaysia without a waiver of sovereign immunity. The Spanish Arbitration was therefore a violation of the plaintiff's right to sovereign immunity. Indeed, no waiver had been made by Malaysia of its sovereignty to any court or another nation including the Superior Court of Justice of Madrid or even before an arbitrator in relation to the Deed of Cession. (paras 32 & 33)

(4) The Deed of Cession concerned the grant and cession in perpetuity of territories and lands on the former State of North Borneo which now constituted territories within the modern-day State of Sabah. Thus, the High Court of Sabah was the natural and proper forum to adjudicate on any dispute arising out of the Deed of Cession. Moreover, the rightful successors to the late Sultan of Sulu in the Deed of Cession had earlier submitted to the jurisdiction of the High Court of the State of North Borneo, the predecessor of the High Court of Sabah, which was reflected in the 1939 Suit. The significant consequence of the 1939 Suit was that it reiterated and endorsed the submission of the plaintiff that the High Court of Sabah was the natural and proper forum to determine the dispute. The predecessors of the first to eighth defendants recognised the High Court of the State of North Borneo to be the proper forum to determine matters arising from the Deed of Cession. Any rightful heirs or successors of the late Sultan of Sulu in the Deed of Cession was therefore bound by the decision of the 1939 Suit and must accordingly submit to the jurisdiction of the High Court of the State of North Borneo in the event of any dispute arising from the Deed of Cession. (paras 35-39)

(5) There was no nexus between Spain and the Deed of Cession which was the *raison d'etre* of the dispute, nor was Spain remotely connected to the parties to the dispute. It was by the first to eighth defendants 'own account in their notice of arbitration dated 30 July 2019 that the Madrid Protocol of 1885 resulted in the renunciation by the Spanish Government of all claims of sovereignty over the territories in the State of North Borneo. Such protocol settled the colonial border dispute between the British and Spanish Government by affirming the position of the British Government over North Borneo and any Spanish claim to sovereignty over it was void. As such, such protocol had severed any connection Spain had over the dispute as well as the parties to the dispute. Due to such lack of nexus, Spain could not be the natural and proper forum to be hearing this matter. (para 45)

(6) The cause of action and the facts on which the current proceedings were based were well within the local jurisdiction of this court. The dispute resulted from the Deed of Cession which also related to territories and lands situated within the local jurisdiction of this court. Therefore, the High Court of Sabah by virtue of s. 23(1) of the Courts of Judicature Act 1964 had the jurisdiction to hear this matter. As service of all the cause papers had been effected, by virtue of O. 11 of the Rules of Court 2012, this High Court was therefore seized with the jurisdiction over this dispute, making this High Court to be the natural and proper forum to hear the alleged dispute. (paras 47 & 48)

Case(s) referred to:

Goodness For Import And Export v. Phillip Morris Brands SARL [2016] 7 CLJ 303 FC ***(refd)***

Hii Yii Ann v. Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors [2017] 10 CLJ 743 HC ***(refd)***

Rahimtoola v. Nizam of Hyderabd [1958] AC 379 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)

Rules of Court 2012, O. 11

Other source(s) referred to:

Andrea Marco Steingruber, *Consent in International Arbitration,* p 114

Jean-Francois Poudret and Sebastian Besson, *Comparative Law Of International Arbitration,* 2nd edn, pp. 123-125

For the plaintiff - Alice Loke Yee Cing & Narkunavathy Sundareson; SFCs
For the defendants - Absent and Unrepresented

Reported by Suhainah Wahiduddin

JUDGMENT

Mairin Idang J:

Introduction

[1] This is an action by way of originating summons (encl. 1) filed by the Government of Malaysia in relation to the matter of an *ad hoc* arbitration in Spain between the plaintiff and the first to ninth defendants before Dr Gonzalo Stampa (ninth defendant) as the sole arbitrator.

[2] On 3 December 2019, an application (encl. 3) was filed for the following reliefs:

(i) An interlocutory injunction to restrain the defendants and each of them, whether acting by themselves or through their agents, successors and/or assigns, from proceeding with, participating in or taking any steps whatsoever to conduct or participate in *ad hoc* arbitration proceedings purportedly commenced by the first to ninth defendants in Spain ("Spanish Arbitration") pursuant to the grant by the Sultan of Sulu of Territories and Lands on the mainland of the Island of Borneo dated 22 January 1878 ("Deed of Cession"), on pain of the penalty of contempt, until the determination of this originating summons or further order;

(ii) An interlocutory injunction to restrain the defendants and each of them, whether acting by themselves or through their agents, successors and/or assigns, and any persons whomsoever, from proceeding with, or taking any steps whatsoever to conduct or participate in the Spanish

Arbitration or by howsoever means, infringe the Sovereign Immunity of Malaysia, on pain of the penalty of contempt, until the determination of this originating summons or further order;

(iii) An interlocutory injunction to restrain the first to eighth defendants and each of them, whether acting by themselves or through their agents, successors and/or assigns, from seeking the recognition or enforcement of any award made in the Spanish Arbitration, on pain of the penalty of contempt, until the determination of this originating summons or further order.

(iv) Such further or other orders and/or directions as this Honourable Court deems fit and proper; and

(v) Costs of and relating to this action be costs in the cause.

[3] After hearing the plaintiff on encl. 3 on 11 December 2019, I granted the *ex parte* injunction. I then fixed 26 December 2019 for an *inter partes* hearing of encl. 3.

[4] Enclosure 1 had come for full argument. The defendants did not enter appearance despite being served with all the cause papers and notices. Nevertheless, I proceeded to hear the plaintiff's full argument before I made my decision. On 14 January 2020, I granted the order prayed for after hearing the plaintiff. I was satisfied on the balance of probabilities that the plaintiff had proved its case.

The Action

[5] In encl. 1, the plaintiff sought the following reliefs:

(i) A declaration that there is no valid or binding or any arbitration agreement contained in the grant by the Sultan of Sulu of Territories and Lands on the mainland of the Island of Borneo dated 22 January 1878 ("Deed of Cession");

(ii) A declaration that in any event there is no arbitration agreement between the plaintiff and the first to eighth defendants;

(iii) A declaration that there is no waiver of the Sovereign Immunity of Malaysia, whether through the plaintiff or otherwise, such as to confer jurisdiction in proceedings before the Superior Court of Justice of Madrid in Proc. 4/2018 for the purported appointment of the ninth defendant, Dr. Gonzalo Stampa, as sole arbitrator in *ad hoc* arbitration proceedings purportedly commenced by the first to eighth defendants in Spain ("Spanish Arbitration") pursuant to the Deed of Cession;

A (iv) A declaration that the ninth defendant has no jurisdiction over the plaintiff as the Sovereign State of Malaysia;

(v) A declaration that this Honourable Court is the natural and proper forum to determine a claim, if any, by the first to eighth defendants against the plaintiff whether as detailed in the notice of arbitration B dated 30 July 2019 submitted by the first to eighth defendants in the Spanish Arbitration or otherwise;

(vi) Injunction, interlocutory and permanent, to restrain the defendants and each of them, whether acting by themselves or through their agents, successors and/or assigns, from proceeding with, participating C in or taking any steps whatsoever to conduct or participate in the Spanish Arbitration on pain of the penalty of contempt;

(vii) Injunction, interlocutory and permanent, to restrain the defendants and each of them, whether acting by themselves or through their agents, successors and/or assigns, and any persons whomsoever from D proceeding with, or taking any steps whatsoever to conduct or participate in the Spanish Arbitration or by howsoever means, infringe the Sovereign Immunity of Malaysia, on pain of the penalty of contempt;

E (viii) Injunction, interlocutory and permanent, to restrain the first to ninth defendants and each of them, whether acting by themselves or through their agents, successors and/or assigns, from seeking the recognition or enforcement of any award made in the Spanish Arbitration, on pain of the penalty of contempt;

F (ix) An order that the defendants forthwith, take all such steps as may be necessary and expedient to permanently stay or discontinue the Spanish Arbitration;

(x) Such further or other orders as this Honourable Court deems fit and proper; and G

(xi) Costs of and relating to this action be paid by the first to ninth defendants to the plaintiff.

[6] Basically, the grounds relied upon by the plaintiff are as follows:

H (i) The first to eighth defendants have commenced the Spanish Arbitration pursuant the Deed of Cession, signed between the Sultan of Sulu and Baron Gustavus de Overbeck and Alfred Dent of the North Borneo Company in 1878, which in present day is binding upon the heirs of the Sultan of Sulu, and the Sovereign State of Malaysia;

I

(ii) The heirs of the Sultan of Sulu had in 1939 submitted to the jurisdiction of this Honourable Court, then under the title of the High Court of the State of North Borneo, in respect of a dispute under the Deed of Cession, where judgment was delivered by Chief Justice Macaskie in Civil Suit No. 169/39 in favour of the said heirs;

(iii) Despite the absence of any, or any valid or binding agreement between the parties to the Deed of Cession to refer disputes thereunder to arbitration, and despite the submission by the heirs of the Sultan of Sulu to this Honourable Court, the Superior Court of Justice in Madrid was moved by the first to ninth defendants to appoint a sole arbitrator in the Spanish Arbitration without regard *inter alia* to established conflict of laws and forum selection rules, and in violation of the Sovereign Immunity of Malaysia;

(iv) Further, the appointment of the ninth defendant, Dr Gonzalo Stampa, as sole arbitrator in the Spanish Arbitration is null and void for procedural defects and substantive lack of jurisdiction in the proceedings in the Superior Court of Justice in Madrid, and consequent to this and the earlier cited grounds, the ninth defendant has no jurisdiction over the Sovereign State of Malaysia; and

(v) The commencement and prosecution of the Spanish Arbitration by the first to ninth defendants are accordingly oppressive and vexatious, and carried on in violation of the legal and sovereign rights of Malaysia. In such circumstances, it is proper for this Honourable Court, as the natural forum for any disputes arising from the Deed of Cession, to enjoin the defendants from proceeding with the Spanish Arbitration.

[7] Since none of the defendants appeared, I did not therefore have the benefits of their response to those grounds. Nevertheless, I have taken the liberty to consider each of the grounds submitted by the plaintiff to satisfy myself on the balance of probabilities that they have satisfied the necessary requirement to get the reliefs sought for.

Background Facts

[8] The subject matter is the territory of Sabah formerly known as North Borneo. Sabah was once known as the British Crown Colony of North Borneo until 1963 when it decided to be part of a new nation called Malaysia with the Federation of Malaya, Sarawak and Singapore. Since then, Malaysia has been recognised as one of the member states of the United Nations (UN). Malaysia is therefore a sovereign nation.

[9] However, Sabah has a chequered history. At one time, Sabah was claimed by the Sultanate of Brunei and the Sultanate of Sulu on different parts of Sabah. Arising from these claims is one Deed of Cession Agreement 1878 (Deed of Cession) made between the Sultan of Sulu and Baron Gustavus de Overbeck (Overbeck) and Alfred Dent (Dent) dated 22 January 1878. One of the purposes of the Deed of Cession was the ceding of dominion over certain territories by the Sultan of Sulu to Overbeck and Dent and from the language of the Deed of Cession, suggests the same relates to sovereign territory. On that account, the sovereignty of the Sultan of Sulu over Sabah had passed to Overbeck and Dent and therefore such rights can be passed on to subsequent parties.

[10] The Deed of Cession resulted on payment of annual cession monies of 5000 Malay Dollars to the heirs of the Sultan of Sulu. This position of cession monies was confirmed by the judgment of Chief Justice of the State of North Borneo, C.F.C. Macaskie in the Civil Suit No. 169/39, case of *Dayang Dayang Haji Piandao Kiram of Joto*, *Philippines & 8 Others v. The Government of North Borneo & Others* which was heard in the North Borneo High Court in Sandakan in 1939 ("1939 Suit").

[11] The heirs of the Sultan of Sulu at that time duly accepted having submitted to the jurisdiction of the North Borneo High Court in Sandakan. This has been the position before the arbitration proceedings came about before the ninth defendant.

The Issues

[12] From my reading of the cause papers and analysis of the argument, presented the three issues to be addressed in coming to a determination are as follows.

No Valid Or Binding Arbitration Agreement

[13] Reference to the copy of Deed of Cession and copy of its official English translations which was extracted from the book edited by Sir William George Maxwell, K.B.E., C.M.G. (Chief Secretary to Government F.M.S.) and William Sumner Gibson (Legal Advisor, F.M.S.), printed by J. Truscott & Son Ltd in 1924 entitled "*Treaties and Engagements Affecting The Malay States and Borneo*" as produced and tendered as exh. A1 by the plaintiff would show that on 22 January 1878, a grant was signed by the then Sultan of Sulu, Sri Paduka Maulana Al Sultan Mohamet Jamal Al Alam bin Sri Paduka Al Marhom Al Sultan Mohamet Fathlon and His Highness' dependencies thereof on behalf of their heirs and successors which had the effect of granting and ceding at their own free and sovereign will to Overbeck and Dent as representatives of the British Company, all the rights and powers

belonging to the Sultan of Sulu over all the territories and lands being tributary to His Highness on the mainland of the island of Borneo forever and in perpetuity.

[14] These territories and lands commenced from the Pandasan River on the north-west coast and extending along the whole east coast as far as the Sibuco River in the south and comprising amongst others the States of Paitan, Sugul, Bangaya, Labuk, Sandakan, Kinabatangan, Mumiang, and all the other territories and states to the southward thereof bordering on Darvel Bay and as far as the Sibuco River with all the islands within three marine leagues of the coast.

[15] As part of the grant, the said territories and lands are therefore vested to Overbeck and Dent co-jointly, their heirs, associates, successors or assigns for as long as they choose or desire to hold them. Except with the sanction of Her Britannic Majesty's Government, the rights and privileges conferred by the grant shall never be transferred to any other nation or company of foreign nationality.

[16] In consideration, Overbeck and Dent promised to pay as compensation to the Sultan of Sulu, his heirs or successors the sum of five thousand dollars per annum.

[17] In the event of any dispute, a dispute settlement provision was also provided in the Deed of Cession and for ease of reference, I append below the relevant excerpt from the Deed of Cession:

> In case of any dispute shall arise between His Highness the Sultan, his heirs or successors and the said Gustavus Baron de Overbeck or his Company it is hereby agreed that the matter shall be submitted to Her Britannic Majesty's Consul-General for Borneo.

[18] As for this present case before me, I agree with the submission of the plaintiff that there is no provision in this Deed of Cession that could be construed either expressly or impliedly indicating the parties' consent or intention to refer disputes arising from such Deed of Cession to arbitration.

[19] In the book entitled "*Consent in International Arbitration*" by Andrea Marco Steingruber, the learned author at p. 114 explained:

> The arbitration must clearly express the parties' intention to submit their dispute to arbitration, instead of going to a national court. The agreement should make clear that arbitration is the exclusive forum in which disputes between parties are to be resolved. In particular, all ambiguity in the strict sense of the word should, mediation, expert determination, and other modes of dispute resolution should be avoided. Should the parties intend to subordinate their arbitration to prior conciliation proceedings, they should mention it in their arbitration agreement since this is a requirement of their submission to arbitration. Indeed the fulfilment of this requirement is a prerequisite for consent to arbitration becoming effective.

[20] In the book entitled "*Comparative Law Of International Arbitration*" by Jean-Francois Poudret and Sebastian Besson, 2nd edn at pp. 123 to 125, the essential elements of an arbitration agreement are stated as follows:

i. The arbitration agreement must, like any contract, be concluded between two or more parties who are determined or determinable;

ii. The arbitration agreement must clearly express the parties' intention to submit their dispute to arbitration, i.e to the binding decision of one or more arbitrators appointed according to their agreement;

iii. The arbitration agreement must specify the object of the dispute submitted to the arbitrators;

iv. The arbitration agreement must directly or indirectly connect the arbitration to a legal system which will ensure its effectiveness in the absence of any contractual mechanism to this effect.

[21] There is no provision in the Deed of Cession to indicate the parties' agreement to submit their dispute to arbitration. There is also no provision to show that arbitration is the exclusive forum in which disputes between parties are to be resolved. The Deed of Cession is silent as to the specific dispute to be referred to arbitration, the seat of arbitration and appointment of arbitrators. These are among the requirements needed to indicate parties, submission to arbitration. Absence of which I found no valid legal basis for the defendants to be referring dispute arising from the Deed of Cession to the Spanish Arbitration.

[22] Furthermore, it has been clearly and expressly provided for in the Deed of Cession that any dispute that arises between the parties to the Deed shall be submitted to Her Britannic Majesty's Consul-General for Borneo.

[23] As the dispute settlement provision was drafted in such plain and unambiguous manner, I cannot but read such provision literally to educe the intention of parties in the Deed of Cession. Reading the Deed of Cession, it cannot be imputed to contain any arbitration clause. As such, I found that such submission of disputes to Her Britannic Majesty's Consul-General for Borneo could not be regarded as an actual reference to arbitration. There is not an iota of evidence to infer that such reference *ipso facto* means a reference to that entity to act as an arbitrator.

[24] I have also referred to the Civil Suit No. 169/39 between *Dayang Dayang Haji Piandao Kiram of Jolo, Philippines & 8 Others v. The Government of North Borneo & Others* (1939 Suit), the plaintiffs which were ostensibly the predecessors of the first to eighth defendants in this present case who had moved the High Court of the State of North Borneo in 1939 for a declaration that they were entitled to receive the cession monies payable by the Government of North Borneo under the Deed of Cession made between the

Sultan of Sulu and the predecessors of the Government of North Borneo. Chief Justice of the State of North Borneo at that time, C.F.C. Macaskie in his ruling allowed the relief sought for by the plaintiffs.

[25] Such ruling is of great significance. It shows that even the heirs and successors of the Sultan of Sulu have recognised and acknowledged that there is no arbitration provision in the Deed of Cession. The act of the heirs and successors of the late Sultan of Sulu in bringing their cause before the High Court of the State of North Borneo must be deemed as waiver of any form of arbitration under the Deed of Cession.

[26] In addition, I am also in complete agreement with the plaintiff that if the dispute settlement provision is to be regarded as an arbitration agreement, such provision would be rendered inoperative and incapable of being performed as the position of Her Britannic Majesty's Consul-General for Borneo no longer exists.

[27] The absence of such designation today is also acknowledged by the first to ninth defendants in their notice of arbitration dated 30 July 2019 submitted to the Spanish Arbitration. It was due to such absence that prompted them to request for the appointment of an appropriate person or persons by the British Government to fulfil the Consul-General's role in determining the alleged dispute laid before the Spanish Arbitration. Nevertheless, the U.K. Foreign & Commonwealth Office on behalf of the British Government in a letter dated 8 December 2017 declined such request on various grounds, *inter alia*, the unclear identity of the first to ninth defendants beyond the description provided by them in their letter to the office, and the unclear position of the Deed of Cession and the rights or claims of the first to eight defendants may have under such Deed of Cession after the dissolution of the Colony of North Borneo in 1963. The office also suggested that the first to eight defendants should take up their claim directly to the Government of Malaysia, which to date, they have refused to do so.

[28] Nonetheless, despite such position no longer exist, its stand on the issue of dispute settlement arising from the Deed of Cession is well reflected and quoted by the Chief Justice Macaskie in his judgment to the 1939 Suit. In a letter dated 14 April 1937, the then Resident of Sandakan was quoted stating:

> In a letter dated the 28th July 1936, His Britannic Majesty's Consul General at Manila informed His Excellency that the Philippine Government had decided not to recognise the continued existence of the Sultanate; and I am to say that His Excellency is therefore unable to take cognizance of Dayang Dayang Haji Piandao or anyone else as Sultan of Sulu.

A There will accordingly be no longer any "successor" to the Sultanate and the question of the person to whom the cession moneys are to be paid depends on who is the rightful heir under the Cession of 22nd January, 1878.

Before, therefore, any of the Cession Money due in respect of the period
B subsequent to the demise of the Sultan can be paid, **it will be necessary for any claimants to establish their claim in the High Court of this State** and it will be for them to produce evidence of the Sulu custom of inheritance sufficient to satisfy the Court that their claim is valid.

(emphasis added)

C **[29]** Therefore, such statements lent credence to that fact that no arbitration agreement established in the Deed of Cession and any dispute ought to be brought before the High Court.

[30] Absence of any valid and enforceable arbitration agreement between the parties estopped the first to eighth defendants from referring any alleged
D dispute to arbitration.

[31] The act of the defendants in persisting with the Spanish Arbitration despite no binding arbitration agreement established between the parties amount to a grave violation of the plaintiff's legal rights and the court must not stand idle to allow such abuse of process to persist.

E *There Is No Waiver Of The Sovereignty Immunity Of Malaysia So As To Confer Jurisdiction In Proceedings Before The Superior Court Of Justice Of Madrid Or Elsewhere*

[32] It is trite law both under municipal and international law that no
F sovereign nation is subject to jurisdiction of a court in another sovereign nation unless that nation submits to the jurisdiction or waive its immunity. Before me, it was argued by the plaintiff on this issue as follows:

(i) The claims by the first to eighth defendants relate to the plaintiff's sovereign territory. This is evident from the nature of the dealing in the
G Deed of Cession. The original counterparty was the Sultan of Sulu ceding his sovereign territory to the plaintiff's successors-in-interest. The very wordings of the Deed of Cession bear testimony to this fact which is as follows:

> ... hereby grant and cede of our own free and sovereign will ...
H forever and in perpetuity all rights and powers belonging to us ...

(ii) Therefore, based on the alleged dispute arising from the Deed of Cession, the plaintiff has immunity from judicial and arbitration proceedings;

I

(iii) The Sovereign Immunity principle is a rule of customary international law recognised also by the Malaysian Courts.

See

1) *Rahimtoola v. Nizam of Hyderabd* [1958] AC 379

2) *Hii Yii Ann v. Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors* [2017] 10 CLJ 743

(iv) In this case, the Deed of Cession is not a trading or commercial agreement, but one relating to cession of land by a sovereign to predecessors of what is now a Sovereign State. In such circumstances, Malaysia is absolutely immune from the proceeding in Spain.

(v) The plaintiff as advised by its Spanish counsel that Spain recognises the doctrine of Sovereign Immunity, unless the Sovereign State has waived its immunity by submitting to either arbitration or judicial proceedings, which the plaintiff has not.

(vi) The plaintiff as a Sovereign State cannot be forced to submit to the jurisdiction of the ninth defendant. The dispute in the instant case which is over territorial rights in Sabah, is not arbitrable.

(vii) The sole arbitrator cannot assume jurisdiction over Malaysia without a waiver of sovereign immunity. The Spanish Arbitration is therefore a violation of the plaintiff's right to sovereign immunity.

[33] I have considered these arguments in the light of the principles aforementioned earlier and I am of the view that indeed no waiver has been made by Malaysia of its sovereignty to any court of another nation including the Superior Court of Justice of Madrid or even before an arbitrator in relation to the Deed of Cession.

[34] In view of my finding on this issue, it is also my finding that the ninth defendant has no jurisdiction to deal with the alleged dispute as presented by the first to eighth defendants. There is no evidence whatsoever to indicate that the plaintiff has submitted jurisdiction to the jurisdiction of the ninth defendant.

The High Court Of Sabah Is The Natural And Proper Forum To Determine The Dispute

[35] The Deed of Cession concerns the grant and cession in perpetuity of territories and lands on the former State of North Borneo which now constitute territories within the modern-day State of Sabah, Malaysia.

[36] Thus, as rightly submitted by the plaintiff, the High Court of Sabah is the natural and proper forum to adjudicate on any dispute arising out of the Deed of Cession.

[37] Moreover, the rightful successors to the late Sultan of Sulu in the Deed of Cession had earlier submitted to the jurisdiction of the High Court of the State of North Borneo, the predecessor of the High Court of Sabah.

[38] This is reflected in the 1939 Suit between *Dayang Dayang Haji Piandao Kiram of Jolo, Philippines & 8 Others v. The Government of North Borneo & Others* in which the Chief Justice of North Borneo at that time, C.F.C. Macaskie who presided over the case found for the plaintiffs of the case and granted order that they were entitled to the monies payable under the Deed of Cession. It was also further held and I quote:

> any party is at liberty to apply to this Court in the event of any dispute arising thereon.

[39] The significant consequence of the 1939 Suit is that it reiterated and endorsed the submission of the plaintiff in this instant case that the High Court of Sabah is the natural and proper forum to determine the dispute. It also illustrates how the predecessors of the first to eighth defendants recognised the High Court of the State of North Borneo to be the proper forum to determine matters arising from the Deed of Cession. Any rightful heirs and successors of the late Sultan of Sulu in the Deed of Cession is therefore bound by the decision of the 1939 Suit and must accordingly submit to the jurisdiction of the High Court of the State of North Borneo in the event of any dispute arising from the Deed of Cession. The first to eighth defendants cannot attempt to rely on the 1939 Suit to substantiate their claim over the cession monies provided under the Deed of Cession yet refuse to acknowledge and submit to the jurisdiction of the High Court of the State of North Borneo.

[40] The official stand of the then North Borneo Government at that time which is disclosed in the letter dated 14 April 1937 by the then Resident of Sandakan as quoted by Chief Justice Macaskie in his judgment to the 1939 Suit, also expressly indicates the High Court of the State of North Borneo, the predecessors of the High Court of Sabah, as the proper forum of any dispute arising from the Deed of Cession.

[41] The first to eighth defendants in their notice of arbitration dated 30 July 2019 to move the Superior Court of Justice of Madrid for the appointment of the sole arbitrator premised their decision for Spanish Arbitration as follows:

> ... neither the Malaysian nor Philippine courts were likely to serve as non-corrupt, impartial guardians of the arbitral process ...

[42] In response, I agree with the submission of the plaintiff that this statement is a mere allegation made grounded on speculations and conjectures without any factual basis.

[43] The independence of the Malaysian Judiciary is recognised throughout the world including the predecessors of the first to eighth defendants when they successfully prove their claim over the cession monies in the 1939 Suit. There is no reason for the first to eighth defendants to be fretful that they would be encountering any personal or juridical disadvantage when pursuing their claim in the High Court of Sabah.

[44] The first to eighth defendants have clearly engaged in forum shopping when they unilaterally decided Spain to be the forum for the appointment of the sole arbitrator, seat of arbitration, and supervisory court in this case. No regards whatsoever have been made to the well-established rules on conflict of laws and forum selection in making such decision.

[45] There is no nexus between Spain and the Deed of Cession which is the *raison d'etre* of the dispute, nor is Spain remotely connected to the parties to the dispute. It is by the first to eighth defendants' own account in their notice of arbitration dated 30 July 2019 that the Madrid Protocol of 1885 resulted in the renunciation by the Spanish Government of all claims of sovereignty over the territories in the State of North Borneo. Such Protocol settled the colonial border dispute between the British and Spanish Government by affirming the position of the British Government over North Borneo and any Spanish claim to sovereignty over it was void. As such, such Protocol has severed any connection Spain has over the dispute as well as the parties to the dispute. Due to such lack of nexus, Spain could not be the natural and proper forum to be hearing this matter.

[46] In addition, the High Court of Sabah is clothed with the jurisdiction to hear this instant case despite the defendants are not within the jurisdiction of this court by virtue of s. 23(1) of the Courts of Judicature Act 1964 which states:

> (1) Subject to the limitations contained in Article 128 of the Constitution every High Court shall have jurisdiction to try all civil proceedings where:
>
> (a) **the cause of action arose**, or
>
> (b) the defendant or one of several defendants resides or has his place of business, or
>
> (c) **the facts on which the proceedings are based exist or are alleged to have occurred,** or
>
> (d) **any land the ownership of which is disputed is situated, within the local jurisdiction of the Court** ... (emphasis added)

[47] In this instant suit, the cause of action and the facts on which the current proceedings are based are all within the local jurisdiction of this court. The dispute resulted from the Deed of Cession which is also related to territories and lands situated within the local jurisdiction of this court. Therefore, the High Court of Sabah by virtue of s. 23(1) of the Courts of Judicature Act 1964 has the jurisdiction to hear this matter.

[48] In the Federal Court case of *Goodness For Import And Export v. Phillip Morris Brands SARL* [2016] 7 CLJ 303, it was held by the apex court of Malaysia that the service of cause papers pursuant to O. 11 of the Rules of Court 2012 would confer jurisdiction on the High Court. Reverting to the present suit, after leave to serve the defendants out of jurisdiction was obtained, all the cause papers were duly served to all defendants as confirmed by the plaintiff on 8 January 2020 and supported by the affidavits of service duly filed on 8 January 2020. As service of all the cause papers has been effected, by virtue of O. 11 of the Rules of Court 2012, this High Court is therefore seised of jurisdiction over this dispute, making this High Court to be the natural and proper forum to hear the alleged dispute.

Conclusion

[49] In the circumstance and for the reasons stated above, I allowed order in terms of all the reliefs sought for by the plaintiff in the originating summons encl. 1. There shall be no order as to costs but parties are given the liberty to apply.